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IN THE

Supreme Court of the United States

October Term, 1941.

No. 1006. 1007

WARNER COMPANY,
Petitioner,

v.

FRANK B. LOVERICH,
Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

EVERETT H. BROWN, JR.,
SAMUEL B. FORTENBAUGH, JR.,
Counsel for Petitioner.

International, 236 Chestnut St., Philadelphia

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner Warner Company prays for writs of *certiorari* to the Circuit Court of Appeals for the Third Circuit to review a final decree of that Court entered on March 17, 1941.

I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This petition seeks a review on writs of *certiorari* of the decree of the Circuit Court of Appeals for the Third Circuit, remanding the case to the District Court for the Eastern District of Pennsylvania with directions to enter judgment for the libellant for maintenance from July 6th, 1933 to April 30th, 1941, excluding periods of employment and hospitalization, and for medical care from the date of trial to April 30th, 1941, all without prejudice to any later suit to recover additional maintenance and cure. The District Court awarded to the libellant maintenance and cure

from October 24, 1933 to February 7th, 1934, less a period of hospitalization.

In January, 1925, the libellant, Frank B. Loverich, commenced his employment as a one-man caretaker on the oil barge "O1" (Record pp. 15, 47) at which time he had a "huskiness" in his throat (Record p. 82). The barge "O1" was a supply barge which was towed about Philadelphia harbor, having no helm or means of propulsion (Record pp. 15, 105). (See also barge photograph—Libellant's Ex. No. 2, Record p. 68.) The libellant's duties were the usual ones aboard a barge, in that he tended lines, saw to the pumps, and did everything necessary for the safety of the barge and cargo. Libellant testified his oil loads lasted six weeks (Record p. 21). His itinerary is not clear but at one point he testified he never went outside the harbor (Record p. 17).

The original owner of the barge and employer of the libellant was the Hainesport Mining and Transportation Company, which was merged in 1929 into the respondent Warner Company. There are available no records with respect to the barge operation; there is no record of any claim of injury or disability being made by the libellant because admittedly he made no claim. The respondent sold the barge in 1935 (Record p. 11).

On July 6th, 1933, the libellant was dismissed from the employ of the respondent, the respondent giving him a letter of recommendation stating that he was a faithful employee who was ill (Record p. 26). The respondent's industrial physician reported that he found the libellant suffering from advanced arteriosclerosis, chronic laryngitis, aphonia and left incomplete inguinal hernia (Record p. 93). From November 20, 1933 to January 18th, 1934, the libellant was under observation and treatment at the Stapleton Hospital, Ellis Island, New York (Record p. 29). He was discharged from the hospital "as being improved as far as the hoarseness was concerned, unimproved as to the condition of his cardiovascular system" (Libellant's Ex. No. 3, Record p. 70).

On February 7, 1934, the libellant obtained employment with the Reading Company, which continued for about fourteen months (Record p. 26). Libellant says he got better and was able to do his regular work (Record p. 25).

From March 5, 1935 to March 8th, 1935, he was under examination at the Philadelphia General Hospital, where it was recommended that he undergo a throat operation. He refused to do so (Record pp. 32, 57).

Immediately thereafter he obtained employment as a bargeman, this time with the S. C. Loveland Co., Inc., working in and about the port of Philadelphia, which employment continued for about fifteen months (Record p. 27).

There is no evidence as to the libellant's activities thereafter until May 18th, 1939, when he returned to the Philadelphia General Hospital and was operated upon for a throat condition diagnosed as cancer. An artificial windpipe was inserted. Some X-ray treatment followed the operation (Record p. 58).

The present suit was instituted by a libel in admiralty filed on October 24th, 1939, seeking both indemnity for negligence and maintenance and cure as a seaman because of personal injuries allegedly suffered by libellant as a result of a fire aboard respondent's oil barge "O-1" on January 23rd, 1926 (Record pp. 2-5). Respondent filed peremptory exceptions (Record pp. 5-6), which were dismissed, and an answer which denied liability for either negligence or maintenance and cure and set forth that in any event libellant was a harbor worker who was guilty of laches (Record pp. 6-9). The claim for indemnity has been abandoned.

The District Court for the Eastern District of Pennsylvania, by Honorable Harry E. Kalodner, dismissed the claim for indemnity, finding there was no proof of negligence nor any connection between libellant's condition and his employment. Judge Kalodner allowed libellant's claim for maintenance and cure commencing from a date six years prior to the institution of the suit (Oct. 24, 1933) and ter-

minating with his first re-employment (Feb 7, 1934). The District Court thus applied by analogy the six-year statute of limitations to the amount of recovery, but not to the right to sue, and held further that the liability for maintenance and cure was terminated when the seaman was able to return to his employment (Record pp. 106-115).

The Circuit Court of Appeals, on May 17th, 1941, by a majority opinion per Judge Goodrich, concurred in by Judge Maris, remanded the case to the District Court with directions to enter judgment for the libellant for maintenance and cure from the date of discharge to April 30, 1941 and thereafter if necessary, less only periods when wages were earned or free hospitalization secured (Record pp. 120-125).

A dissenting opinion was filed by Circuit Judge Clark on the ground that the award of the majority went beyond the law and the testimony, there being no indefinitely continuing liability to pay maintenance and cure and no evidence that treatment would have improved libellant's condition. Judge Clark suggested that "his learned brethern misjudge the scope of the decision of the Supreme Court in the leading case of *Calmar SS Corp. v. Taylor*" (Record p. 125).

Both the majority and the minority of the Circuit Court Judges agreed with the District Court's statement "that libellant's right to maintenance and cure is premised solely on his unquestioned illness and the attending disability which existed at the termination of his employment with the respondent, and is completely independent of, and unrelated to, any events prior to that time." (Record p. 113.)

There is no substantial dispute on the facts and the District Judge and the majority and minority of the Circuit Judges have reached conflicting decisions upon the same premises.

II. STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE DECREE IN QUESTION.

On March 17th, 1941, the Circuit Court of Appeals for the Third Circuit filed its opinion. The return of the mandate was stayed for an additional thirty days by order of the Circuit Court to permit filing of the within petition for writs of *certiorari* in accordance with Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

This case is one of admiralty jurisdiction and concerns the extent of the liability of a vessel owner for maintenance and cure.

It is respectfully submitted that the facts in this case bring it within the decisions of this Court which have allowed writs of review for the following reasons:

(A) Where there is conflict between the Circuit Court decision and the decisions of other Circuit Courts on the same matter.

Forsyth v. Hammond, 166 U. S. 506, 514 (1896).

(B) Where there is an important question of Federal law which has not been, but should be, settled by this Court.

Calmar SS. Corp. v. Taylor, 303 U. S. 525, 527 (1938);
Charlotte Just et al. v. Alma Chambers, et al., 61 Supreme Court, 687 (March 3, 1941);
The Three Friends, 166 U. S. 1, 49 (1896).

(C) Where the Circuit Court has decided a Federal question in a way probably in conflict with the applicable decisions of this Court.

Adamson v. Gilliland, 242 U. S. 350, 353 (1916);
Davis v. Schwartz, 155 U. S. 631, 636 (1894).

III. QUESTIONS PRESENTED.

1. Is a sole employee working on a harbor barge, which barge is without helm or means of propulsion, a seaman entitled to maintenance and cure under the admiralty law, or a "harbor worker" under the provisions of the Longshoremen's and Harbor Workers' Compensation Act of 1927 (44 Stat. 1424, et seq.)?

2. Is there any liability on the owner of a vessel for maintenance and cure where the disability is not service-connected and there is no proof that it arose during the employment on the vessel?

3. Does the vessel owner's liability for maintenance and cure survive re-employment by others for substantial periods of time at similar maritime work?

4. Does the duty of a vessel owner to supply maintenance and cure continue indefinitely in the case of an incurable disease?

5. Does the Statute of Limitations apply by analogy to bar or limit recovery for maintenance and cure?

IV. REASONS RELIED UPON FOR THE GRANTING OF WRITS OF CERTIORARI.

1. The Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeal on the same matter:

(A) Other Circuit Courts have decided unanimously that a one-man operator of a harbor barge, without helm or means of propulsion, is not a seaman and is covered exclusively by the Longshoremen's and Harbor Workers' Compensation Act of 1927. (Title 33 U. S. C. A. Sec. 901 et seq.)

DeWald v. B. & O. R. Co., 71 Fed. (2) 810 (1934), (C. C. A. 4th, certiorari denied 293 U. S. 581);

Diomede v. Lowe, 87 Fed. 2d, 296 (1937), (C. C. A. 2nd, certiorari denied 301 U. S. 682);
Harper v. Parker, 9 Fed. Sup. 744 (D. C. Md. 4th Circuit) (1935);

(B) A District Court in the Second Circuit has determined that subsequent similar employment does terminate a vessel owner's liability for maintenance and cure.

The Ball Brothers, 35 Fed. 2d, 261 (1929) (Western District of New York, 2nd Circuit).

(C) Other Circuit Courts have determined that the right to maintenance and cure does not continue indefinitely and beyond a reasonable time to effect a cure.

Lindgren v. Shepard SS. Co., 108 Fed. 2d, 806 (C. C. A. 2nd 1940);
Delpy v. Crowley Launch & Tugboat Co., 99 Fed. 2nd, 36 (C. C. A. 9th 1938);
The Point Fermin, 70 Fed. 2d, 602 (C. C. A. 5th 1934).

2. The Circuit Court of Appeals for the Third Circuit has decided important questions of Federal law which have not been, but should be, settled by this Court:

(A) There is no prior authority for continuing the duty of "care" after subsequent similar employment. Judge Goodrich (Record p. 123):

"Upon this point we find no help in the authorities."

Judge Clark (Record pp. 130, 132):

"Just how far beyond port and how far towards the conversion of the merchant marine into a public health service the courts should go, has been puzzling.

. . . For that reason, the writer prefers a remand for further proceedings. He prefers it not only because of the case at bar, but also because of the widespread implications of the problem. Both seamen and shipowners are entitled to know their rights and obligations in cases of this so dread and prevalent disease."

(B) There is no prior authority for failing to apply the statute of limitations by analogy to claims for maintenance and cure brought more than six years after the termination of employment.

Judge Kalodner (Record p. 110):

"The existing case law is silent on the question of when the six year period begins to run."

3. The Circuit Court of Appeals for the Third Circuit has decided a Federal question in a way probably in conflict with the applicable decisions of this Court.

(A) This Court has found no support in the decisions imposing "upon the shipowner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease, which manifests itself during his employment, but is not caused by it".

Calmar SS. Corp. v. Taylor, 303 U. S. 525, 530 (1938).

(B) This Court has determined that a caretaker-operator on a harbor supply barge, is within the exclusive jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act of 1927.

South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251 (1940).

WHEREFORE, your petitioner respectfully prays that writs of certiorari be issued under the seal of this Court,

directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this Court on a day designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, and the decree of the Circuit Court of Appeals reversed, and that your petitioner may be granted such other and further relief as to this Court may seem proper.

EVERETT H. BROWN, JR.,
SAMUEL B. FORTENBAUGH, JR.,
Counsel for Petitioner.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

EVERETT H. BROWN, JR., being duly sworn, deposes and says that he is the counsel for the petitioner herein; that he has read the foregoing petition and that the matters therein stated are true to the best of his knowledge, information and belief.

EVERETT H. BROWN, JR.

Sworn to and subscribed before me this 28th day of April, 1941.

HELEN R. McSORLEY,
(Seal) *Notary Public.*